Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-584

UNITED STATES OF AMERICA for the Use of JAMES SINCLAIR, and JAMES SINCLAIR,

Petitioners,

vs.

THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES SINCLAIR,
521 Park Avenue,
Detroit, Michigan 48226,
Petitioner Pro Se.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Statement of the Facts of the Case	2
Reasons for Granting the Writ	5
First Question	5
Further Importance	6
Second Question	7
Conclusion	9

APPENDIX

Judgment	A-1
Order, on Rehearing	A-1
Memorandum, Opinion of the Ninth Circuit Court of Appeals	A-2
Kennedy, J. Concurring	A-6
Order Dismissing Complaint as to Defendant The Hanover Insurance Company	A-7

TABLE OF AUTHORITIES CITED

Cases	Page
Bailey v. Warner, 118 Fed. 395 (1902)	6
Bivens v. Six Agents, 456 F.2d 1339 (1972)	8
Colpoys v. Foreman, 163 F.2d 908 (1947)	6
County of Hawaii v. Martin, 33 Haw. 677	6
Covell v. Heyman, 111 U.S. 176 (1884)	1, 5
Elyea v. Williamson, 59 Ga. 432 (1876)	7
Gwin v. Barton, 6 How. 7 (47 U.S. 7) (1848)	5
Hagood v. Blythe, 37 Fed. 249 (1889)	6
Hill v. Thomas, 70 Nev. 389	6
Hinds v. Keith, 57 Fed. 10 (1893)	6
Holden v. Williams, 75 Fed. 798 (D.C. Alaska 1896)	7
Lammon v. Feusier, 111 U.S. 17 (1884)	1, 5, 9
Robertson v. Sichel, 127 U.S. 507 (1888)	1, 2, 7, 9
Sen. Hartke v. FAA, 369 F.Supp. 741	7
United States v. Davidson, 25 Fed. Cases 771, Case # 14,921 (1864)	2

Miscellaneous

1 Opinions of Attorney General, p. 92	6

Rules

Federal Rules of Civil Procedure, Rule 12(b)(6)	3
Federal Rules of Criminal Procedure, Rule 5	3

Statutes	Page
Illinois Statutes (1973) Chap. 38, Sec. 84	7
1 Statutes at Large, p. 87	6
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1352	3
United States Constitution, Fourth Amendment	3
United States Constitution, Fifth Amendment	3

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

UNITED STATES OF AMERICA for the Use of JAMES SINCLAIR, and JAMES SINCLAIR,

Petitioners,

vs.

THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

James Sinclair prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case for the reason that the judgment is in direct conflict with decisions in the Fifth, Eighth, and District of Columbia Circuits; and is in direct conflict with the decisions of this Court in *Lammon v. Feusier,* 111 U.S. 17; *Covell v. Heyman,* 111 U.S. 176, and *Robertson v. Sichel,* 127 U.S. 507.

Citations to Opinions Below.

The opinions below are unreported and are printed *infra* in the Appendix, the District Court not writing an opinion as such but its Order Dismissing Complaint did state the court's reasoning.

Jurisdiction.

The judgment of the Court of Appeals was entered May 7, 1976, and the petition for rehearing and rehearing in banc was filed May 21, 1976, and was denied by order filed August 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented for Review.

May a Court of Appeals without citation of any authority ignore the universal body of the law of other Circuits and the Supreme Court to decide that an injured individual has no right to sue on the official bond of a U.S. Marshal?

Is a Marshal still liable for the official acts of his deputies under *Robertson v. Sichel,* 127 U.S. 507, 515?

Statement of the Facts of the Case.

Under common law authority of *United States v. Davidson,* 25 Fed. Cases 771, Case # 14,921 (1864), petitioner brought this action for damages in the name of the United States for his use, on the official bond written by respondent Hanover Insurance Company for respondent U.S. Marshal G. L. Campbell, alleging illegal seizure, search, and abuse by the marshal's deputies who were also sued, and alleging the marshal's ratification, encouragement, and negligence.

Jurisdiction was founded on multiple bases: 28 U.S.C. Sec. 1352 (official bond); the Fourth Amendment to the Constitution of the United States; diversity of citizenship with the matter in controversy exceeding the value of $50,000.00; pendent jurisdiction; and further federal questions involving the Fifth Amendment to the Constitution of the United States, and Federal Rules of Criminal Procedure 5.

The deputies admitted that the petitioner was searched and that no contraband or weapons were found, and that petitioner was held for a while and later released without any charges being brought. The deputies admitted that the petitioner was accosted at an airport while petitioner was leaving a gate after all parties knew the plane had left.

The District Judge dismissed the Marshal from the action under F.R.C.P. 12(b)(6), retaining the deputies and the bonding company as defendants (no details for this dismissal were given; the Court of Appeals found the complaint stated a claim for relief against the Marshal, and reversed).

The bonding company Hanover Insurance Co. moved to dismiss before filing an Answer. The District Judge granted the motion on the grounds that the surety could not be liable if the principal were not liable. The Court of Appeals affirmed the dismissal of Hanover even though they reversed as to the Marshal; the

court held that an individual had no right to sue on the bond; petition for rehearing and rehearing in banc citing the authorities *infra* was denied.

The deputies' second motion for summary judgment was granted. Petitioner appealed the resulting District Court judgment dismissing the action. The Court of Appeals reversed the judgment which had been in favor of the deputies, holding that there were triable facts and stated that the allegations of abuse were sufficient to state a claim upon which relief can be granted.

Therefore the petitioner applies to this Court to review the judgment of the Court of Appeals insofar as it affirmed the dismissal of the Hanover Insurance Co.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully submits that the judgment of the Ninth Circuit Court of Appeals that Hanover can not be liable to an individual on the bond of the Marshal conflicts with the decisions in the Fifth, Eighth, and District of Columbia Circuits, the decisions of this Court, and the bond itself.

The first paragraph of the Memorandum of the Court of Appeals states that Hanover made a "promise to indemnify" only the United States for the actions of the Marshal or deputies, and that therefore the individual James Sinclair has no rights to sue on the bond for his injuries.

It is important to note that the Court of Appeals neither cited authority, nor distinguished the bond recovery cases cited to it. Nor will respondents be able to do so in reply to this Petition. There is apparently *no* case saying an individual as such can not recover on the bond of a Marshal.

This Court in *Lammon v. Feusier,* 111 U.S. 17 (1884) affirmed a Nevada federal court judgment that the sureties on the marshal's bond were liable, not to the government, but to private party Henry Feusier. At page 19 is noted that the bond is nominally to the *government,* to indemnify the *injured party. Covell v. Heyman,* 111 U.S. 176 (1884), on page 181 refers to "A third person" having a "remedy for damages" "against his sureties" (of the marshal). *Gwin v. Barton,* 6 How. 7 (47 U.S. 7) (1848), states on page 10 that an individual is to "proceed regularly by action" if he seeks "to charge the sureties for the default of the marshal".

The District of Columbia Circuit affirmed in *Colpoys v. Foreman,* 163 F.2d 908 (1947), noting on page 909 that:

> "The plaintiff recovered judgment for $6,500. The defendants, the marshal's executors and *surety,* have appealed." (Emphasis added.)

The Eighth Circuit held the surety liable for $600 damages to an individual in *Bailey v. Warner,* 118 Fed. 395, 396 (1902).

The Fifth Circuit in *Hinds v. Keith,* 57 Fed. 10 (1893), affirmed a judgment for Keith against sureties Sheats, Green, Peevy, and Harrison (p. 12).

Hagood v. Blythe, 37 Fed. 249, 252 (1889) states:

> "Let plaintiff have judgment against each surety in the sum of $173.43."

These bonds were provided for by the First Congress (1 Stat. 87), since it was known that marshals were likely to be judgment-proof and that security was required for both the government and for its individual citizens (1 Op. Atty. Gen. 92). The principle goes back at least to 1662 in English statutes. Also see *County of Hawaii v. Martin,* 33 Haw. 677, 685; *Hill v. Thomas,* 70 Nev. 389, 395-396. At present petitioner does not even have security that he can recover his costs on the appeal he has won, marshal's wages not being reachable by execution!

The very bond put forward into court by Hanover stated, as also alleged in the Complaint, "A person . . . . may sue thereon, in his own name".

There is a further importance to this case warranting grant of certiorari. The bond has a total value of some $3,000,000.00 for abuse of airport searches for

93 marshals, and the statute of limitations is open until 1978. This abuse is so prevalent that the Illinois legislature has enacted an airport exclusionary rule! Illinois Statutes, ch. 38, sec. 84 (1973). Also as to abuse, *Sen. Hartke v. FAA,* 369 F.Supp. 741.

It is worthy of this Court's attention to make sure that persons injured by marshals in person or property can recover on the bond as they were intended so to recover.

There is a final point for review. The Court of Appeals stated that the "contention is without merit" that the Marshal is liable for the acts of his deputies. (footnote, A-4, *infra*).

However, *Robertson v. Sichel,* 127 U.S. 507, 515 (1888) states:

> "a superior officer may be held liable for . . . . the act of a *deputy* performed in the ordinary line of his official duty as prescribed by law." (Emphasis added.)

Holden v. Williams, 75 Fed. 798, 800 (D.C. Alaska 1896) states re U.S. marshals:

> "The rule that the superior officer is liable for acts of his deputy done under color of his office is too well settled to need discussion.
>
> The demurrer is overruled."

Elyea v. Williamson, 59 Ga. 432 (1876) *holds* that an injured party can *not* sue a deputy U.S. marshal because under common law he can sue only the marshal himself for the acts of the deputy!

The Ninth Circuit would encourage the employment of irresponsible deputies. However, the original statutory

scheme was that of inter-liability tending to secure responsible officers: the surety was responsible for both the marshal and the deputy, and was subrogated against them. The marshal being principal on the bond was thereby liable for the default of the deputy. The marshal required the deputy to furnish a bond to indemnify the marshal, as the marshal was liable for the deputy over and above the amount of the marshal's own bond. Irresponsible persons would find it hard to secure bonds, and the public would thus be protected against them to begin with.

It is worthy of this Court's writ of certiorari that responsibility is encouraged, in this day where products and government are too often shoddy. As the Second Circuit said on remand (*Bivens v. Six Agents,* 456 F.2d 1339, 1346 (1972)):

> "The policy underlying this common law rule is equally applicable to federal police officers. We believe the long line of cases culminating in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), indicates a woeful laxity on the part of some police officers, state and federal, in complying with constitutional standards, and this laxity would only be encouraged by a grant of immunity. We do not agree with the reasoning of cases that support a contrary conclusion. It would be a sorry state of affairs if an officer had the 'discretion' to enter a dwelling at 6:30 A.M., without a warrant or probable cause, and make an arrest by employing unreasonable force."

Conclusion.

Because of the manifest error of the Court of Appeals, the lack of authority to contradict petitioner's argument, and the importance of setting right the Marshal system, the petitioner contends that certiorari should be granted to resolve the conflict of the Ninth Circuit opinion, probably with summary reversal, or remand to consider the decisions such as *Lammon v. Feusier,* 111 U.S. 17, and *Robertson v. Sichel,* 127 U.S. 507, 515.

October, 1976.

Respectfully submitted,

JAMES SINCLAIR,
Petitioner Pro Se.

APPENDIX

APPENDIX.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, Plaintiffs-Appellants, v. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants-Appellees. No. 74-2151, DC #73-1131-R-Civil.

Appeal from the United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in favor of Hanover. Judgment in favor of Gaylord C. Campbell, Terry Walter and Thomas Charles Kupferer, Jr., is reversed and the case is remanded for further proceedings.

Filed and entered May 7, 1976.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, Plaintiffs-Appellants, vs. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants-Appellees. No. 74-2151.

Filed: Aug. 13, 1976.

Before: Merrill, Hufstedler and Kennedy, Circuit Judges.

The panel as constituted in the above case has voted to deny appellants' petition for rehearing. Judges Hufstedler and Kennedy voted to reject the suggestion for a rehearing in banc and Judge Merrill recommended rejection. The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appellees' tardily tendered petition for rehearing or clarification may be filed. The petition is denied. Judge Kennedy would grant rehearing.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, *Plaintiffs-Appellants,* vs. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., *Defendants-Appellees.* No. 74-2151.

[May 7, 1976]

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL, HUFSTEDLER and KENNEDY, Circuit Judges.

Judgment dismissing the action against Hanover Insurance Company is affirmed. There is no showing

that the United States has suffered loss by virtue of actions of the Marshal or his deputies. Nor can such loss result from this action, where the United States is not named as defendant and judgment against it is not sought. Thus nothing has occurred (or could occur by virtue of this action) that would call upon Hanover to perform its promise to indemnify.

Judgment dismissing the action against Marshal Campbell and summary judgment in favor of his deputies were, in our view, premature.

As to the Marshal, while he did not himself play any part in the detention or search, the complaint does charge him with having occasioned such conduct through advising and encouraging his deputies to behave in such a fashion and disregard the rights of those with whom they have to deal. Appraising the sufficiency of the complaint in accordance with the standard set forth in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), we think that it alleges sufficient personal involvement on the part of the Marshal so as to state a claim for relief.

Further, allegations of the complaint to the effect that the Marshal negligently selected, trained and supervised his deputy would appear sufficient to withstand motion to dismiss under *Navarette v. Procunier,* ..... F.2d ..... (9th Cir. 1976).

We have only examined the allegations respecting Campbell in the context of a motion to dismiss. The extent to which other materials in the record would, if taken into consideration, serve to support summary judgment is a question we cannot anticipate at this time. The order granting motion to dismiss states that it was based on the "pleadings, the memoranda filed

by the parties, and the oral argument at the time of the hearing."[1]

As to the action against the deputies, any justification for their detention and search of Sinclair on the grounds that it was an airport search ended when it became apparent that Sinclair did not intend to board a plane at that boarding area. *United States v. Moore,* 483 F.2d 1361, 1363 (9th Cir. 1973); *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973). We accept, arguendo, that founded suspicion would justify a brief detention and patdown under *Terry v. Ohio,* 392 U.S. 1 (1968). However, the detention that followed could only be justified as an arrest on traditional showing of probable cause to suppose Sinclair guilty of crime; and the search that accompanied it could only be justified as one incident to arrest and subject to the limitations that apply to such searches, *see United States v. Rothman,* 492 F.2d 1260, 1265-66 (9th Cir. 1973), *United States v. Mehciz,* 437 F.2d 145, 146-48 (9th Cir. 1971); or on a showing of probable cause to suppose that the search would be productive of evidence of crime which could well be lost if the search were to await warrant. *United States v. Smith,* 503 F.2d 1037, 1040-41 (9th Cir.

[1]On appeal Sinclair contends that without regard to the Marshal's own acts of commission or omission, he is liable for the acts of his deputies under the principle of *respondeat superior.* This contention is without merit. While the doctrine imposes liability on an employer (or master) for the wrongful acts of his agent (or servant), it does not (in absence of a statute to the contrary, *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir. 1971)), impose liability on a public officer for the wrongful acts of his subordinates. *Robertson v. Sichel,* 127 U.S. 507 (1888); *Lander v. Morton,* 518 F.2d 1084, 1087 (D.C. Cir. 1975); *Boettger v. Moore,* 483 F.2d 86 (9th Cir. 1973). We reject appellant's contention that 28 U.S.C. §564 is designed to impose such liability on the Marshal; that provision relates solely to the scope of the coverage of the bond.

1974), *cert. denied* 419 U.S. 1124. On this record it cannot be said that such justification has been established as matter of law. The facts as to what actually occurred at the boarding area and after Sinclair left the area were controverted in the affidavits and must be resolved in fact-finding proceedings before judgment as to the deputies' justification may be rendered.

Moreover, in our view the allegations with respect to the deputies' threats were sufficient to state a claim of intentional infliction of emotional distress under California law. *State Rubbish Collectors Ass'n. v. Siliznoff,* 38 Cal.2d 330, 240 P.2d 282 (1952); *Alcorn v. Anbro Engineering, Inc.,* 2 Cal.3d 493, 468 P.2d 216, 86 Cal.Rptr. 88 (1970).

As to standards for judging immunity, both of Marshal Campbell himself and of his deputies, further light has been cast by recent decisions. The deputies cannot be held liable, even for an unconstitutional search and detention, if they "reasonably believed in good faith that [the detention and search were] constitutional * * *" *Pierson v. Ray,* 386 U.S. 547, 557 (1967); *Burgwin v. Mattson,* 522 F.2d 1213 (9th Cir. 1975). Judgment under this inquiry must await resolution of the factual issues presented in the affidavits.

The standards for judging immunity of Marshal Campbell are those set forth in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), and *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975). As was the case with the deputies, factual questions with respect to Campbell's activities must be resolved before the question of his immunity can be decided.

In all respects further proceedings are necessary. As to some issues, amplification of the record may

suffice to eliminate need for trial. As to all remaining issues, trial would appear to be necessary.

Judgment in favor of Hanover is affirmed.

Judgment in favor of Gaylord C. Campbell, Terry Walter and Thomas Charles Kupferer, Jr., is reversed and the case is remanded for further proceedings.

KENNEDY, J. Concurring:

I agree that the further development of the facts in this case is warranted. However, I would not limit the use of the airport search rationale to those persons intending to board airplanes. Here it appears that after a plane departed, Sinclair passed through the magnetometer at a boarding area, set off a positive reading, and then attempted to leave the airport. I consider this conduct potentially dangerous for two reasons: (1) he may have been testing the sensitivity of the magnetometer in preparation for a future attempt to carry a weapon on board an airplane; (2) he may have been carrying a weapon or device which he intended to use in the terminal or on a different flight. In a proper case, these possibilities might well support a finding that the search was justified under traditional doctrines, in light of exigent circumstances.

Airport searches are also justified under a theory of consent necessarily given as a condition of passing through a checkpoint. I would hold that such consent cannot be withdrawn after a person has alerted the detection device. The efficacy of such systems would be seriously undermined if potential terrorists got a free bite at avoiding detection. In our troubled times, a person who goes into a crowded airport and sets off a metal detector should not complain if the authorities are less than courteous.

Order Dismissing Complaint as to Defendant The Hanover Insurance Company.

United States District Court, Central District of California.

James Sinclair, Plaintiff, vs. The Hanover Insurance Company, a corporation; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants. No. 73-1131-R.

FILED: Feb. 21, 1974.

Defendant The Hanover Insurance Company has moved for dismissal of the cause of action against it. The Court having heard the arguments of the parties and having considered the matter; the matter having been submitted and plaintiff having filed his Supplemental Opposition To Motion of Hanover for Dismissal Or For Summary Judgment;

IT IS ORDERED the motion is granted and the complaint is dismissed as to defendant Hanover Insurance Company. An indemnitor's liability is based upon the liability of the principal. The Court having determined there can be no liability visited upon the principal—defendant Gaylord Campbell having been heretofore dismissed—no liability can be visited upon the indemnitor. The bond here indemnifies Campbell's responsibility—either direct or vicarious—not the responsibility of deputy United States Marshals.

Dated: February 21, 1974.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE